



In

THE

BOOK



# In the Supreme Court of the United States

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OCTOBER TERM, 1899.

No. 368.

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THE BIENVILLE WATER SUPPLY COMPANY,  
Appellant,  
VS.  
THE CITY OF MOBILE, et al., Appellees.

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BRIEF OF APPELLEE ON MOTION TO DISMISS  
OR AFFIRM.

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## STATEMENT OF THE CASE.

The bill in equity in this cause was filed in the Circuit Court of the United States, Fifth Judicial Circuit, Southern District of Alabama, on February 21st, 1899, by the appellant against the appellees and sought to enjoin the City of Mobile from erecting, constructing or operating a system of water works to be owned by said city, and from operating what is known as the Stein or Mobile City Water Works, which the City of Mobile had acquired. An injunction was asked upon the ground that such action upon the part of the City of Mobile was or would impair the obligation of certain contracts entered into by and between the City of Mobile and the Bienville Water Supply Company, in violation of Article 1, Section 10, of the Constitution of the United States.

The original contract, of which the other was and is an extension, was entered into by the parties on August 15th, 1888, and was extended by a subsequent agreement entered into between said parties on April 14th, 1891, which latter instrument, according to its terms, extended the original contract until July 1st, 1900. These contracts

are made a part of the bill as Exhibits "A" and "B." (Record, pages 5-11.)

The said contracts made a part of the bill, show that the only obligation resting upon the City of Mobile is to pay for two hundred and sixty (260) fire hydrants at the rate of fifty dollars per hydrant, per annum, payments to be made monthly. (Record, pages 8 and 11.)

There is no averment in the bill that the City of Mobile has refused to pay for said hydrants according to the terms of the contract, or that it intends in the future to repudiate its obligation to make said payments.

The bill shows that the Bienville Water Supply Company, the appellant, was chartered under an act of the General Assembly of Alabama, and that it was thereby charged with the duty of introducing into the Port of Mobile such supply of pure water as the domestic, sanitary and municipal wants thereof might require, and for this purpose it was authorized to construct all needed canals, ditches, and by pipes and aqueducts as might be found best for the purpose, etc. (Record, page 1.)

The appellees demurred to the bill upon the principal ground, among others, that the bill failed to allege or show any violation or impairment of the contracts on the part of the City of Mobile. (Record, page 13.) The court sustained the demurrer of the appellees and allowed the appellant fifteen days in which to amend its said bill as it might be advised. (Record, page 21.) The appellant failing to amend its said bill within the time allowed by said order or decree of the court, it was on the motion of the appellees, by a decree of the court on June 9th, 1899, dismissed. (Record, page 22.)

#### ARGUMENT.

We contend that an examination of the record will show that the opinion of Judge Toulmin (Record, pages 15-21) to the effect that the bill of appellant fails to allege anything whatever which tends to show that the City of Mobile has or intends to violate or impair its contract with the appellant, is clearly correct. The bill shows that the appellant did not derive any authority or power to construct or operate its water works from the

City of Mobile, and that the power was obtained by it from the State of Alabama. The charter of the appellant also shows that the State of Alabama in the act creating the appellant, fixed the maximum rates the company was authorized to charge for water supplied to the inhabitants of the City of Mobile. See Section 14 of the charter of the Bienville Water Supply Company printed in the appendix to this brief. The bill avers that the City of Mobile was authorized to build and operate a system of water works under certain acts of the General Assembly of Alabama. Copies of which said acts are appended to this brief. These acts are public statutes of which courts take judicial notice and neither the contents nor the substance of such statutes need be set forth or recited in a pleading. *Smith vs. Tallopoosa Co.*, 2 Woods, (U. S.) 574; 23 American & English Ency of Law, 1 Ed., page 286. The bill does not allege that the appellant has an exclusive privilege of furnishing the City of Mobile and its inhabitants with water. The bill shows (Record, page 1,) that all the parties to this suit are citizens of the State of Alabama. The jurisdiction of the Circuit Court was sought to be obtained by an averment in the bill that the acts and doings of the City of Mobile in constructing and operating water works of its own was violating and impairing its contract with the Bienville Water Supply Company, the appellant.

We submit that if our contention, and the conclusion of the court below, is correct, that the bill shows nothing done or suffered or intended to be done or suffered by the City of Mobile to impair or violate its contracts with the appellant, then it must follow that as soon as that proposition is made manifest, no federal question remains and that the Circuit Court and this honorable court are without jurisdiction. If a motion had been made to dismiss the bill because it did not show that the Constitution of the United States had been or was contemplated being violated by the parties defendant, and the court upon examination of the bill had found such to be the truth, would not an order dismissing the bill have been proper? Surely there is enough color for this motion to dismiss, as will warrant this honorable court in enter-

taining the alternative motion of the appellees to affirm.

Metcalf vs. The Alaska, 120 United States, 210.

Northern Pacific R. R. Co. vs. Amato, 144 United States, 465.

We think what was said by this court in Wilson vs. North Carolina, ex rel Caldwell, 169 United States, 586, aptly appropriate to the case at bar. Mr. Justice Peckham said: "Upon the case made by the plaintiff in error, the federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the federal constitution have been violated," and we add thereto, in this cause by impairing the obligation of an existing contract. See also Craemer vs. State of Washington, 168 U. S., at page 131, *McCain vs. Des Moines* 174 U.S. 168.

In the City of Chanute vs. Trader, 132 United States, 210, this court affirmed a judgment, on a motion to dismiss or affirm, upon the ground that the reasons for taking the writ of error were frivolous and taken for delay only, affirming the judgment notwithstanding it had jurisdiction. The contracts in question made a part of the bill contain nothing to show that the City of Mobile agreed with the Bienville Water Supply Company that it should furnish water to the inhabitants of the City of Mobile, or that said city granted to the said Water Company *the right to furnish water* to its inhabitants during the term of the contract (that was done by the General Assembly of Alabama and accepted by the Water Company) nor that the City of Mobile agreed in said contract not to build or acquire water works of its own while the contract between it and the appellant existed. The contracts made a part of the bill (Record, pages 5-11.) make it plain that the City of Mobile did not grant to the Bienville Water Supply Company any rights or privileges whatever. The General Assembly of Alabama granted to appellant the right to construct its water works, to use the streets of the City of Mobile for that purpose, and fixed the maximum rates the said Water Company was to charge the inhabitants of the City of Mobile for water, and also empowered said Water Com-

pany to make all needful rules and regulations relating to the supply and use of water. See copies of Sections 6, 7 and 14 of the charter of the Bienville Water Supply Company printed in the appendix to this brief. The General Assembly of Alabama in the charter of the appellant also authorized it and the City of Mobile to contract together for supplying said municipal government with water. See Section 16 of Bienville Water Supply Company's charter printed in the appendix to this brief. In the contract in question it was stipulated that the appellant should not charge for water supplied to the citizens of Mobile more than certain maximum rates. The contract does not fix the rates, merely prescribes a maximum. The City of Mobile agreed to pay appellant fifty dollars per annum for each of two hundred and sixty (260) fire hydrants, payments to be made monthly, and we insist that when this is done said city meets all that is required of it under the contract. There is absolutely no averment whatever that the appellee has failed or refused to make the payments, or that it intends not to make the said payments in the future during the existence of the contract. The case of the City of Walla Walla vs. the Walla Walla Water Works, 172 United States, 1, is entirely dissimilar to the case at bar. In that case the city had the right to grant the use of the streets of the City of Walla Walla for the purpose of laying pipes to furnish the inhabitants of said city with water, to any person or association of persons, for the term of twenty-five years. The City of Walla Walla was also authorized under its charter to erect and maintain water works within or without the city limits, or the power to grant the right to erect and maintain water works to other persons or corporations for the purpose of supplying the City of Walla Walla or its inhabitants with water. In the statement of that case by Mr. Justice Brown it is shown, that an ordinance was adopted by the city council of Walla Walla and accepted by the Water Company, granting to such company "for a term of twenty-five years the right to place and maintain all necessary water mains, pipes, connections and fittings in all of the highways, streets and

alleys of said city, for the purpose of furnishing the inhabitants thereof with water." Under the provisions of section seven (7) of said ordinance the City of Walla Walla bound itself not "to erect, maintain or become "interested in any water works except the ones herein "referred to, save as hereinafter specified." Section eight (8) of said ordinance gave the City of Walla Walla the right at any time to take the water works of the Walla Walla Water Company by condemnation proceedings. No such provisions are to be found in the contracts made a part of the bill in this cause. The City of Mobile did not grant an exclusive or any other kind of privilege to the Bienville Water Supply Company, nor did it in its contracts with that company bind itself not to erect, maintain or become interested in water works. Under the constitution of Alabama as construed by the Supreme Court of Alabama in the case of Birmingham and Pratt Mines Railway Company vs. Birmingham Street Railway Company, 79 Alabama at pages 473-475, the City of Mobile and the General Assembly of Alabama had and have no power to grant an exclusive privilege or right. This court has again and again announced that it would follow the construction put upon the constitution of a State by its highest court.

Polk vs. Wendell, 9 Cranch, 89.

Wade vs. Walnut, 105 United States, 1.

Fall Brook Irrigating District vs. Bradley, 164 United States, 112

The learned Judge (Toulmin) of the Circuit Court, after reviewing all of the cases cited by the appellant, in concluding his opinion in the case at bar, said: "Thus "we have seen that the contract in every case, to which "our attention has been called, either provided for an "exclusive right in the Water Company to supply to the "city and its inhabitants, granted or contracted for by "the city, or contained in a covenant by the city that it "would not erect water works of its own, and would abstain from granting the right to do so to a competing "company during the life of the contract. And we have "seen that the contract under consideration in this case "contains no such provisions. We have seen that it



“does not attempt to grant any exclusive right to complainant; that it contains no stipulation or agreement that the complainant shall furnish water to the inhabitants of the City of Mobile, and no covenant by the city that it will not build or acquire water works of its own, or abstain from supplying water to its inhabitants during the continuance of the contract. The parties might have made such a contract but they did not do so.”

The proposition that a man who has a house leased from another, cannot lawfully begin to build a house of his own until the expiration of his lease with the other man, is just as reasonable as the claim that the City of Mobile under its contract with the appellant, cannot be lawfully permitted to erect its own water works, even though it pays every cent that it is obligated to pay under the contract.

We feel convinced that an examination of the record will make it clear that if there ever was a case to apply the principles laid down by this court in the *City of Chanute vs. Trader*, 132, at page 214, this case at bar is one. In that case Mr. Justice Blatchford, for the Court, said: “If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This Court, in the exercise of its inherent power and duty to administer justice ought independently of sub-division 5 of rule 6, to reach the mischief by affirming the action below.” See also *Douglas vs. Wallace*, 161 U. S., 348. In the case at bar it is sought by this appeal to put clogs in the wheel of progress—the building of a great public work, expressly authorized by a sovereign State of the Union.

All of which is respectfully submitted.

B. B. BOONE,  
E. L. RUSSELL,

Counsel for Appellee.

## APPENDIX.

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[ACTS OF ALABAMA, 1882-3, PAGES 452, 453, 456, 457.]

No. 230.)

AN ACT.

H. B. (717.

To incorporate the Bienville Water Supply Company.

Section 6. Be it further enacted, That said corporation is hereby charged with the duty of introducing into the Port of Mobile and the Village of Whistler, in Mobile County, such supply of pure water as the domestic, sanitary and municipal wants thereof may require. And for this purpose said corporation is hereby authorized to construct all needed canals and ditches, and by pipes and aqueducts, as may be found best suited for the purpose, to carry into said towns, by such line or route as may be found best, such water as may be needed, from any point in said county within twenty miles of said Port or City of Mobile. In the laying of its pipes and the construction of aqueducts when required, said corporation is hereby authorized to use, free of charge, any and all public roads of the county, and the streets of said towns, free of charge; but when its pipes are laid in or under said roads or streets, or its other works completed, said corporation shall, without delay, restore said roads and streets to their original condition for use as public highways and thoroughfares, and to perform the public duty hereby declared, and by the acceptance of this charter imposed upon it. Said corporation shall have the right to enter upon any land of private persons, and therein and beneath the surface thereof, to lay pipes for the conveyance of said water, and thereafter repair and maintain the same; but said corporation shall not enter upon any private lot in said towns, without the consent of the owner thereof, and before entering on any private property, must first pay to the owner thereof, such reasonable compensation for its use of said land for the purpose herein declared, as may be agreed upon with said owner, or in case of disagreement, as may be ascertained upon pro-

ceedings for that purpose, as directed by law, for the condemnation of private property, or the use thereof to public use.

Sec. 7. Be it further enacted, That for the supply tubes or pipes leading from the main or large pipes in the streets or roads to the houses or other places where the water is required for use, and for the hydrants and other appliances connected therewith, said corporation shall be entitled to have and demand from the person or persons requiring the water, the reasonable cost thereof, and of fixing and adjusting the same, and said corporation shall have authority to make all needful rules and regulations relating to the supply and use of said water.

Sec. 14. Be it further enacted, That said corporation be and the same is hereby authorized to demand and receive for compensation for the supply of water it may furnish, at not exceeding the following rates, to be paid by the person receiving the water, and in advance, that is to say, for every family consisting of six persons, or less, not more than twenty dollars per annum, and two dollars per annum for every person additional, two children under twelve years of age, to be estimated as two for one. For retail grocery stores where liquors are not retailed, twelve dollars per annum; for retail grocery stores where liquor is retailed, from twenty to fifty dollars per annum; for liquor stores doing the business of drawing off and bottling wines or other liquors, from thirty to seventy-five dollars per annum; for stores without families, or for offices, twelve dollars per annum; for baths for private families, five dollars per annum; for a horse, five dollars per annum; for a buggy or carriage, three dollars per annum; for the use of ships and steamboats, vessels and other water crafts, per hogshead of one hundred and twenty gallons, (50c) fifty cents per hogshead. Coffee houses, oyster saloons, confectioneries, manufactories, hoteis, taverns, boarding houses, steam mills, tan yards, brick yards, soda water stands, livery stables, public baths, public or private fountains, baking, dyeing, scouring and renovating establishments, and other places of business not herein enumerated, may be supplied at an annual charge, according to the quantity

of water which may be required, on such terms as may be agreed upon.

Sec 16. Be it further enacted, \* \* \* \*  
And the Bienville Water Supply Company, and the municipal authorities of the Port or City of Mobile, may contract with each other, on such terms as they can agree upon, for the employment by said company, of apparatus or appliances of their own in connection with said water works, for the extinguishment of fires or for other public purposes, but the existing police board shall not, by anything in this act contained, be empowered to levy, demand or collect any other or additional taxes than they are now by law empowered to levy, demand and collect.

Approved February 19th, 1883.

(ACTS OF ALABAMA, 1898-9, PAGES 19-21.)

No. 9.

AN ACT

H. No. 47.

To authorize the City of Mobile to provide, maintain and operate systems of waterworks and sewerage.

WHEREAS, it is provided by an Act entitled "An Act to provide a Charter for the City of Mobile," approved February 6th, 1897, section twenty-one, that the General Council of said city has the right to contract for, build, or purchase, or otherwise acquire, public works subject to the approval of the majority vote of the citizens of Mobile at a special election called therefor; and,

WHEREAS, at a special election duly called and held in the City of Mobile, on the 2d day of August, 1897, the Mayor and General Council of the City of Mobile was, by a majority vote of the citizens of Mobile, authorized to contract for, purchase, build, or otherwise acquire a system of water works to be owned by said City of Mobile, to cost not exceeding five hundred thousand dollars (\$500,000), and a system of sewerage to be owned by said City of Mobile, to cost not exceeding two hundred and fifty thousand dollars (\$250,000), payment to be

made for said works by issuing bonds, and securing the same by a mortgage upon said public works ; and,

WHEREAS, it is deemed desirable to empower said city to build, purchase, or otherwise acquire and maintain and operate said systems of water works and sewerage so authorized by a majority vote of the citizens of said city ; THEREFORE,

Section 1. BE IT ENACTED by the General Assembly of Alabama, that the Mayor and General Council of the City of Mobile be and it is hereby authorized and empowered to buy, or to build, erect and maintain, and to operate water works for the supply of its inhabitants with water, for the extinguishment of fires and for sanitary, domestic and other purposes ; and said Mayor and General Council of the City of Mobile is also hereby authorized and empowered to buy, or to build, erect, and maintain and operate a system of sewerage for the use of said city and its inhabitants.

Sec. 2. BE IT FURTHER ENACTED, That full power be and is hereby given to said Mayor and General Council to enter into and make all needful contracts for acquiring a location or locations for machinery and stand-pipes, reservoirs, pumps, pipes, hydrants and valves, buildings, and all other parts of such system of water works ; and also for laying sewer pipes, syphons, manholes, flush tanks, pumping engines, and all other parts of such system of sewerage and also for rights of way for the erection of said water works and said sewerage systems, and for this purpose full power and authority is hereby given to said Mayor and General Council to use any and all of the streets or alleys of the City of Mobile, and any or all of the public roads of Mobile County, and in the event said Mayor and General Council are unable to contract for other rights of way, or the land necessary for securing a location or locations for stand-pipes, reservoirs, pumps, buildings, and all necessary machinery needed in erecting and constructing water works and sewerage systems authorized by this Act, the said Mayor and General Council is hereby authorized and empowered in order to obtain the same and the water supply for its stand-pipes, reservoirs, pipes,

sluice ways and canals, to condemn the waters of any stream, creek, spring or river and the lands adjacent thereto, and also the lands forming what is known as the water-shed, if the same are situated in Mobile County, by the exercise of the rights of eminent domain in the manner provided by law for the condemnation of land for public uses, provided, however, that nothing in this section shall be applied or be construed to fix a limit of time within which said Mayor and General Council shall exercise the rights of eminent domain herein conferred, and provided further, that the provisions of this section shall not apply or be construed to authorize said Mayor and General Council to condemn or appropriate to the use of said water works the water in what is known as Clear Creek, in said Mobile County.

Sec. 3. BE IT FURTHER ENACTED, That the said Mayor and General Council shall, and it is hereby invested with full authority and power to make all proper regulations for preserving, maintaining, and operating such water works and sewerage systems when established, and to collect such rates for waters supplied and for the use of said sewerage system as shall be sufficient to pay the interest on any bonds issued by said city for the purpose of providing said water works and sewerage systems, and the expenses necessary for operating the same, and to collect the dues for water so supplied and used, and for the use of said sewerage system and to apply the same to the payment of such interest, provided that such rates shall not exceed the usual and customary rates charged by other cities similarly situated for like service, and the Mayor and General Council shall be and it is hereby authorized and empowered to extend such water works and sewerage systems in any part of the County of Mobile it may deem proper, and in such event all the powers conferred upon and given to the said Mayor and General Council shall apply to such portions of such water works and sewerage systems.

Sec. 4. BE IT FURTHER ENACTED, That the said Mayor and General Council are hereby authorized and empowered to buy or to build, erect, and maintain

said water works ; and said Mayor and General Council is also hereby authorized and empowered to buy, to build, erect and maintain and operate said system of sewerage without holding a special election for the approval of the purchasing or building of said water works and said sewerage systems by the majority vote of the citizens of Mobile.

Sec. 5. BE IT FURTHER ENACTED, That this act shall take effect and be in force on and after its passage.

Approved November 30th, 1898.

[ACTS OF ALABAMA, 1898-9, PAGES 16-18.]

No. 8

AN ACT

H. 48.

To authorize the City of Mobile to make and issue bonds for building, purchasing or otherwise acquiring systems of water works and sewerage for the said city, and to mortgage said works to secure said bonds.

WHEREAS, it is provided by an act entitled "An act to provide a charter for the City of Mobile ; approved February 6th, 1897, Section 21, that the General Council of said city has 'the right to contract for, build, purchase or otherwise acquire public works subject to the approval of the majority vote of the citizens of Mobile at a special election called therefor,'" and

WHEREAS, at a special election duly called and held in the City of Mobile on the second day of August, 1897, the Mayor and General Council of Mobile were, by a majority vote of the citizens of Mobile, authorized to contract for, purchase, build, or otherwise acquire a system of water works to be owned by said City of Mobile, to cost not exceeding five hundred thousand dollars (\$500,000,) and a system of sewerage to be owned by the said City of Mobile, to cost not exceeding two hundred and fifty thousand dollars, (\$250,000) payment to be made for said works by issuing bonds and securing the same by a mortgage upon said public works, and



WHEREAS, it is deemed desirable to authorize and empower the City of Mobile to make and issue bonds to enable the Mayor and General Council of the City of Mobile to provide the public works so authorized and to give the mortgage so authorized by a majority vote of the citizens of said city:

THEREFORE, (Section 1.) Be it enacted by the General Assembly of Alabama, That the Mayor and General Council of the City of Mobile be and they are hereby authorized and empowered to make and execute bonds of the City of Mobile to an amount not exceeding seven hundred and fifty thousand dollars (\$750,000) with interest, payable semi-annually, as evidenced by coupons attached to said bonds at such place or places as may be designated therein, and to sell and issue the same and apply the proceeds arising therefrom to the building, purchasing or otherwise acquiring a system of water works, and a system of sewerage for said city, the proceeds not exceeding five hundred thousand dollars, (\$500,000) face value of said bonds to be applied to the building, purchasing or otherwise acquiring said system of water works, and the proceeds of not exceeding two hundred and fifty thousand dollars, (\$250,000) face value of said bonds, to be applied to the building, purchasing or otherwise acquiring the said system of sewerage as authorized by said majority vote of the citizens of Mobile. Said bonds are to run such time, not exceeding forty years from the date of said bonds, and to bear such interest, not exceeding four and one-half per centum per annum, as may be determined upon by said Mayor and General Council. And the said bonds and coupons for interest thereon shall be negotiable paper, and may be made payable to bearer, and when issued are to be designated as "City of Mobile Water Works and Sewerage Bonds." Said bonds shall be issued under the corporate seal of said City of Mobile, and none of said bonds shall be of a lower denomination than one thousand dollars, or shall be sold or disposed of by the said Mayor and General Council at less than par. Said bonds shall be of such form and contain such provisions consistent with the



provisions of this act as may be determined upon by said Mayor and General Council.

Sec. 2. Be it further enacted, That the said Mayor and General Council be and they are hereby expressly authorized and empowered to mortgage or convey by deed of trust said water works and said sewerage system to secure the payment of such bonds, and the interest thereon, as may be issued under and pursuant to this act, and the said mortgage, or deed of trust, may be made to such trustee as said Mayor and General Council may select, and shall convey any and all property constituting a part of, or used in connection with said water works or sewerage systems, whether owned at the time of the execution and delivery of said mortgage or acquired thereafter, and said mortgage or deed of trust shall contain such provisions not inconsistent with the provisions of this act as may be determined upon by said Mayor and General Council.

Sec. 3. Be it further enacted, That after the lapse of ten years from the issuance of said bonds (unless said Mayor and General Council elect to have the sinking fund become operative at an earlier date) after paying the operating expenses of the said works, the interest on said bonds outstanding, and any repairs and extensions that may be deemed expedient by said Mayor and General Council, there shall remain any surplus in any one year there shall be created with such surplus of net revenue that may be so had, and in each year from year to year, a sinking fund which shall be deposited in the First National Bank of Mobile, and when said fund aggregates the sum of five thousand dollars (\$5,000) said bank shall advertise for the lowest bid from the holders of such bonds, to surrender the same to said sinking fund for payment and cancellation.

Sec. 4. Be it further enacted, That if the income derived from the water works and sewerage system aforesaid is insufficient to pay the operating expenses and the interest upon the said bonds, issued under and pursuant to the terms of this act, any deficiency must be made up and paid up from the general revenue of the City of Mobile.

Sec. 5. Be it further enacted, That the bonds issued under and pursuant to this act, and the interest thereon, shall be exempted from any and all taxes which may be imposed by the City of Mobile.

Sec. 6. Be it further enacted, That said Mayor and General Council are hereby authorized and empowered to issue and sell the said bonds as provided for in this act, without holding a special election for the approval of the issuance of said bonds by the majority vote of the citizens of Mobile.

Sec. 7. Be it further enacted, That this act shall take effect and be in force on and after its passage.

Approved Nov. 30th, 1898.

